No. 78-357

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

ROBERT R. WILLIAMS, et al.,
Appellants,

v.

LEILA G. BROWN, et al.,
Appellees.

On Appeal from the United States Court of Appeals for the Fifth Circuit

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SUPPLEMENTAL BRIEF FOR APPELLANTS ON REARGUMENT

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The controlling issue in this case in our view is whether in the original provision for and the continuation of an at-large system for electing the school commissioners of Mobile County there has been shown any purpose to discriminate against black voters. Only if such a purpose is shown can it be concluded that the at-large system violates the Constitution. No one has seriously urged that any discriminatory purpose animated the legislation of 1826

or 1836 that first established at-large elections or the legislation of 1919 under which that method of election was retained. (App. Opening Br. 8-10, 60-61.) Thus, the only real issue is whether a purpose to discriminate in violation of the Constitution can be inferred from more recent activity or inactivity by the Alabama Legislature.

In deciding that the at-large election of Mobile County school commissioners is unconstitutional, the district court proceeded on the understanding that no purpose to discriminate need be found, despite this Court's decisions in *Washington* v. *Davis*, 425 U.S. 229 (1976), and *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). The court of appeals affirmed by reference to one of several related cases in which it recognized, contrary to the district court, that only purposeful discrimination is condemned by the Fourteenth and Fifteenth Amendments but held that satisfaction of the court's so-called *Zimmer* criteria is equivalent to a finding of such purposeful discrimination.[1] The district court had used these same *Zimmer* criteria as its criteria for determining discriminatory *effect*, as the court of appeals had originally intended them to be used.

The appellees have tried, so far as they could, to ignore the varying and contradictory grounds of decision summarized in the preceding paragraph and to have this Court focus solely on one passing comment by the district court. At one point the district

[1] So-called after Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1974) (*en banc*), *aff'd per curiam on other grounds sub nom.* East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976).

court indicated that, as an alternative to its *Zimmer* analysis, it might have concluded that there was a present purpose to discriminate because of a continuing failure of the legislature to alter the 150-year tradition of at-large elections for the school board.

We have shown in our original briefs that what the district court had to say on this point, besides being a mere statement of an alternative ground of decision that was not adopted, is by no means a finding of fact on this critical issue such as to require deference by this Court, as the appellees would make it. (See Reply Br. 17-20 & n.9.)

Opinions of this Court handed down last term serve to re-emphasize that, if the judgment below were to be affirmed on the tenuous basis that the appellees have resorted to for want of anything better, it would amount to a repudiation of *Washington* v. *Davis* and *Arlington Heights*.

In *Personnel Administrator* v. *Feeney*, No. 78-233, decided June 5, 1979, the issue was the constitutionality of a Massachusetts statute providing a veterans preference in state civil service employment. The constitutional claim was that the statute, though neutral on its face so far as sex is concerned, operated to discriminate against women because, obviously enough, many fewer women than men serve in the armed forces. The policy of veterans preference embodied in the Massachusetts statute at issue dated from 1896, and statutes to carry out that policy were thereafter frequently enacted and amended.

The Court first reaffirmed that, even in what it termed the "paradigm" case of race, "even if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose." Slip op. at 15.

The Court then rejected the argument that a purpose to discriminate against women was evidenced by the repeated legislative consideration, enactment, re-enactment and amendment of the veterans preference statutes. This argument was characterized as being based on the familiar presumption "that a person intends the natural and foreseeable consequences of his voluntary actions." *Id.* at 21. The Court conceded to that argument what had to be conceded: "[I]t cannot seriously be argued that the legislature of Massachusetts could have been unaware that most veterans are men. It would thus be disingenuous to say that the adverse consequences of this legislation for women were unintended, in the sense that they were not volitional or in the sense that they were not foreseeable." *Id.* at 21. However, the Court went on to explain that the "discriminatory purpose" that would sustain a finding that the state legislature has violated the Constitution requires more than this:

> " 'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. See *United Jewish Organizations* v. *Carey*, 430 U.S. 144, 179 (concurring opinion). It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular

> course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group. Yet nothing in the record demonstrates that this preference for veterans was originally devised or subsequently re-enacted because it would accomplish the collateral goal of keeping women in a stereotypic and pre-defined place in the Massachusetts Civil Service." *Id.* at 21-22 (footnotes omitted).

In footnotes that accompanied the textual passage just quoted the Court reiterated that proof of discriminatory intent or purpose usually depends on objective factors[2] and said that the "inquiry is practical" and that what a legislature is " 'up to' may be plain from the results its actions achieve, or the results they avoid." *Id.* n.24. And, after noting that a strong inference of desire to achieve adverse effects can be drawn when the effects are as inevitable as they are for women from veterans preference legislation, the Court made this comment:

> "When as here, the impact is essentially an unavoidable consequence of a legislative policy that has in itself always been deemed to be legitimate, and when, as here, the statutory history and all of the available evidence demonstrate the opposite, the inference simply fails to ripen into proof." *Id.* n.25.

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[2] Comparable statements were made by this Court in *Arlington Heights*, 429 U.S. at 266-68, and in cases following *Arlington Heights*, see, *e.g.*, Castaneda v. Partida, 430 U.S. 482, 492-95 (1977).

There can be no doubt of the legitimacy of the policy of electing members of local governing bodies from the community at large. It is a policy that antedates the founding of the Republic and that was used to elect Mobile County school commissioners beginning in at least 1836. Yet it is by no means a policy of interest only to antiquarians or those in Mobile County. We pointed in our opening brief to a study that concluded that more than 60 percent of all cities in the United States with populations of more than 10,000 use at-large elections. (Opening Br. 68-69 n. 31.)

Moreover, in this case, unlike the situation in Massachusetts, where the veterans preference law underwent frequent revision, the Alabama Legislature in the relevant period was "up to" nothing—except that it did once during the pendency of this litigation enact single-member district legislation for the Mobile County School Board. That fact alone stands out as demonstrable in the story that appellees tell so tendentiously of the fate of that legislation and the resulting ill will and mistrust that have so far prevented a definitive legislative resolution of the basically political issue with which this Court is confronted. (Appellees' Br. 20-31.)

Apart from that incident, there is nothing but testimony that, when any proposal for an election law change is made, legislators are aware of the effect on the number of black people who may be elected. (*Id.* 18.) The testimony is scarcely surprising. Indeed, since the enactment of the Voting Rights Act in 1965, it is essential that any Alabama election law

change be carefully analyzed from the standpoint of its effect on the election of black legislators or officials.

So here, as in *Feeney*, any inference of a legislative purpose to achieve a discriminatory effect by leaving unaltered a system of election that has deep roots in American and Alabama history and in policy does not "ripen into proof" because the statutory history and the available evidence are to the contrary.

The other pertinent recent opinions of the Court are those in the Ohio school desegregation cases handed down at the end of last term. In *Columbus Board of Education* v. *Penick*, No. 78-610, decided July 2, 1979, the Court took care to assure itself that the courts below had not equated disparate impact with segregative intent and thus strayed from the Court's precedents. Slip op. at 13-14. The Court acknowledged in this connection, as it has repeatedly, that "actions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose." *Id.* at 14. In *Dayton Board of Education* v. *Brinkman*, No. 78-627, decided July 2, 1979, the Court made clear that it meant by that observation no more than precisely what it had said. In a footnote it went out of its way to disapprove the invocation by a court of appeals (whose judgment it was affirming for lack of prejudicial error) of an artificial presumption of official discriminatory purpose arising from actions or inactions that would foreseeably produce certain results.

> "We have never held that as a general proposition the foreseeability of segregative

> consequences makes out a prima facie case of purposeful racial discrimination and shifts the burden of producing evidence to the defendants if they are to escape judgment; and even more clearly there is no warrant in our cases for holding that such foreseeability routinely shifts the burden of persuasion to the defendants. Of course, as we hold in *Columbus* today, . . . proof of foreseeable consequences is one type of quite relevant evidence of racially discriminatory purpose, and it may itself show a failure to fulfill the duty to eradicate the consequences of prior purposefully discriminatory conduct." *Id.* at 8-9 n.9.

In this case there is no "prior purposefully discriminatory conduct" to be undone. Whether Mobile County's school commissioners should be elected from districts or at large is a policy judgment—a political decision—that the Alabama legislature first made 150 years ago. It remains a political decision for the legislature to reconsider and remake, if the relevant policy factors move it to do so, within the confines of

constitutional requirements and the particularized constraints imposed by Section 5 of the Voting Rights Act. The judgment below should be reversed to place the responsibility for decision on this issue back where it belongs.

Respectfully submitted,

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